

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

EPHRAIM REGELSON et al., as Trustees, etc.,

Plaintiffs, Cross-defendants and
Appellants,

v.

WILLIAM COMBS et al.,

Defendants, Cross-complainants and
Respondents.

F055444

(Super. Ct. No. 9076)

OPINION

APPEAL from a judgment of the Superior Court of Mariposa County. Wayne R. Parrish, Judge.

Allen, Proietti & Fagalde, Donald J. Proietti; Allen, Fagalde, Albertoni & Flores and Kimberly G. Flores for Plaintiffs, Cross-defendants and Appellants.

Law Office of Steven W. Dahlem and Steven W. Dahlem for Defendants, Cross-complainants and Respondents.

-ooOoo-

The absentee owners of a 206-acre tract of unenclosed land filed a trespass action against the owners of a neighboring parcel who had been using the land for horseback riding. The neighbors filed a quiet title cross-complaint seeking a prescriptive easement for recreational horseback riding.

After a bench trial, the court granted the neighbors a prescriptive easement to use the established trails for their joint lifetimes. The landowners appealed.

Under California law, the neighbors could have acquired a prescriptive easement only if they used the property with a hostile and adverse intent. We conclude that their own testimony establishes they did not have the requisite intent. Instead, their testimony establishes they used the trails thinking the property was open to the public—they did not think they were trespassing, an act hostile to the true owners. Furthermore, Civil Code section 1009¹ prevents the neighbors' recreational use of the preexisting trail network from ripening into a private prescriptive easement.

The judgment will be reversed.

FACTS

Ephraim and Lillian Regelson, husband and wife, acquired 206 acres of land in the foothills of Mariposa County in 1959.² Prior to the Regelsons' purchase, the land had been used for cattle grazing, and the Regelsons continued that use by leasing the land until the overseer of the leasing died in the 1970's.

The Regelsons visited the 206 acres only occasionally, usually on weekdays and never in the summer. They walked on the property, but mostly on the extreme northern portion. They saw some evidence of all-terrain vehicle use, but not of horseback riding. The Regelsons did not learn that the Combses were using the land for horseback riding until 2006.

In June 1994, William and Holly Combs, husband and wife, acquired nine acres of land that adjoined the Regelson land. The Combses' parcel includes their home, a tack shed, and other structures.

¹Further statutory references are to the Civil Code unless otherwise indicated.

²In 1984, the Regelsons transferred the land to themselves as trustees for the Regelson Trust. As the trustees of an express trust, the Regelsons are the persons authorized to sue and be sued in matters involving the trust's property and other rights. (Code Civ. Proc., § 369, subd. (a)(2).) For convenience, this opinion ignores the existence of the trust and refers to the 206 acres as the Regelson land.

The Combses began entering the Regelson land as early as 1997 to walk their horses and began riding horses on the Regelson land in 1999. Prior to 1999, the Combses had seen other people riding horses on the Regelson land. Horseback riding trails were already present on the Regelson land when the Combses began riding there in 1999. The majority of the trails were 18 to 20 inches wide, but sometimes narrowed to 12 inches. Mrs. Combs testified the trails definitely were used by horses and were not simply game trails because of their width, the hoof prints visible on the trails, and the horse manure along the trails.

Cliff Johnson owned property near the Combses' parcel. (RT 110)! Even before the Combses bought their parcel, Johnson had told them that there was lots of riding in the area. When the Combses moved onto their parcel, the Johnsons gave them permission to ride on the Johnsons' property and informed the Combses that other areas were open for riding.

A well-defined network of trails existed on the Regelson land when the Combses began riding in 1999. The Combses did not deviate from the established network of trails and occasionally met other riders. The trial court found the Combses "rode their horses four to five times a month, depending on the weather, usually between 11 a.m. and 4 p.m. on Saturday and Sunday" The Combses did not seek permission to ride on the Regelson land.

Mrs. Combs had surgery in December 2000 and, as a result, the Combses did not ride on the trails for the greater part of 2001. The Combses resumed riding when her condition permitted and continued until 2006.

In December 2005, the Regelsons leased the 206 acres to Kenny and Mary Williams for the purpose of grazing cattle. The lease gave the Williamses the exclusive right to use the property as tenants. The Williamses began to fence the property in 2006.

Mr. Combs first learned that the Williamses did not want riders on the Regelson land when Andy Weare came to the property in late 2006 and said that the property was going to be fenced. Mr. Combs asked Weare if they could discuss riding rights. Weare

told Mr. Combs that he would see if he could get permission for the Combses to ride on the land. Weare subsequently told Mr. Combs that the Williamses did not want horseback riding on the Regelson land.

After the Combses learned in late 2006 that there would not be an agreement to let them ride on the Regelson land, they discontinued their regular use, although Mrs. Combs did ride on the land in 2007 until the fencing was completed.

The fencing of the Regelson land also brought to the parties' attention the possibility that the Combses' horse corral and chicken pen may have been located on the Regelson land. This litigation followed.

PROCEEDINGS

In March 2007, the Regelsons filed a complaint that sought an injunctive order requiring the Combses to remove encroaching structures and to cease trespassing on the Regelson land. The Combses answered and filed a cross-complaint to quiet title in a prescriptive easement that would allow them to use the Regelson land for recreational horseback riding.

The trespass and quiet title claims were tried jointly in a two-day court trial in early April 2008. The Combses' removal of the encroachments was resolved by stipulation of the parties. On April 16, 2008, the trial court filed a "Decision And Judgment After Trial" that denied the Regelsons' request for relief and granted the Combses an easement for "horseback riding upon the existing established trails for the joint lifetimes of defendants Combs only," which was "limited to two horse and riders."

The Regelsons filed a timely notice of appeal.

DISCUSSION

I. Essential Elements for Prescriptive Easement and Standard of Review

An easement is a nonpossessory interest in the land of another, which entitles the owner of the easement to the use or enjoyment of the other person's land. Easements may be acquired by prescription. (*Taormino v. Denny* (1970) 1 Cal.3d 679, 686.)

The essential elements that must be proven by a party claiming a prescriptive easement are “open and notorious use or possession that is continuous and uninterrupted, hostile to the true owner, and under a claim of right” for the statutory period of five years. (*Taormino v. Denny*, *supra*, 1 Cal.3d at p. 686; see § 1007; Code Civ. Proc., § 321.)

These essential elements “are designed to insure that the owner of the real property which is being encroached upon has actual or constructive notice of the adverse use and to provide sufficient time to take necessary action to prevent that adverse use from ripening into a prescriptive easement.” (*Zimmer v. Dykstra* (1974) 39 Cal.App.3d 422, 431.)

Whether the elements of a prescriptive easement have been established is a question of fact for the trial court to determine based on the surrounding facts and circumstances. (*O’Banion v. Borba* (1948) 32 Cal.2d 145, 149-150.) The trial court’s findings regarding the existence of a prescriptive easement must be based on clear and convincing evidence. (*Applegate v. Ota* (1983) 146 Cal.App.3d 702, 708.)

Notwithstanding the level of proof required at trial, appellate courts apply the substantial evidence standard when reviewing the trial court’s findings. (*O’Banion v. Borba*, *supra*, at p. 147.) Under the substantial evidence standard, “[a]ll conflicts must be resolved in favor of the prevailing party and the evidence viewed in a light most favorable to him.” (*Id.* at pp. 147-148.)

II. Claimant’s State of Mind

A. Use with a Hostile and Adverse Intent

The Combses could have acquired a prescriptive easement only if they used the property with a hostile and adverse intent. (6 Miller & Starr, Cal. Real Estate (3d ed. 2001) Easements, § 15:35, p. 15-133.) “A claimed right to use property without an adverse intent will not ripen into a prescriptive easement.” (*Ibid.*, fn. omitted; see *Gas & E. Co. v. Crockett L. & C. Co.* (1924) 70 Cal.App. 283, 289 [hostility requirement includes “hostile intent in the mind of the adverse claimant”].)

In *Case v. Uridge* (1960) 180 Cal.App.2d 1, the court described the intent requirement by stating that “the adverse claim of right must not only exist in the mind of the claimant, but must be proved to have been communicated in some way to the owner, so that [the owner’s] failure to object may be taken against him as an acknowledgement or acquiescence in the right claimed.” (*Id.* at p. 8.) Thus, “[n]either a hostile intent without occupation nor occupation without hostile intent is sufficient.” (*Gas & E. Co. v. Crockett L. & C. Co.*, *supra*, 70 Cal.App. at p. 289.)

B. Evidence of the Combses’ Intent

Whether the Combses used the riding trails with a hostile intent is a critical question in this appeal. The evidence consists of the Combses’ testimony.

During direct examination, Mr. Combs testified that he and his wife began using horses on the property in 1997 and they did not seek permission from the owners. When asked whether he thought he had some right to ride on the land, Mr. Combs replied: “Yes, I believed the trails were open and it was open for riding.”

Mr. Combs also testified that he and his wife had talked to a couple of different people that they met on the land when they were riding, and a woman “said she had established the trails back in the 60s and 70s.” Mr. Combs’s direct examination included the following exchange:

“Q. And these were trails that you came across at least one person that said they’d been doing that for 40 years?

“A. Yes.

“Q. And did that person ever tell you they had permission to do that?

“A. Never asked them.

“Q. So based upon what you saw and what you were told, you thought it was okay to ride on this property, correct?

“A. Yes.

“Q. And you thought it was okay to ride on this property without asking anybody’s specific permission, correct?

“A. Yes.

“Q. And so you never considered when you started riding on the property that you were actually trespassing, did you?

“A. No.

“Q. You thought it was just sort of a neighborly thing people could ride on here because it was open to the public?

“A. Yes.”

Mr. Combs first learned that the Williamses did not want riders on the Regelson land when Andy Weare came to the property in late 2006 and said that the property was going to be fenced. Mr. Combs was concerned about being able to ride horses on the land and asked Weare if they could discuss riding rights. Weare told Mr. Combs that he would see if he could get permission for the Combses to ride on the land. Weare subsequently told Mr. Combs that the Williamses did not want horseback riding on the Regelson land.

During cross-examination, Mr. Combs reiterated the position that he rode on the property thinking it was open to the public:

“Q. Do you believe that your rights to ride these trails were dependent upon anybody else’s rights to ride on these trails?

“A. I assumed if other people were riding on it, that it was okay.
[¶] ... [¶]

“Q. So you don’t know if the Regelsons had granted permission to any of their neighbors or any of the public at large to ride on these trails, is that correct?

“A. That’s correct.

“Q. That was just your assumption?

“A. Yes.”

Mrs. Combs’s testimony was similar to her husband’s. She testified that sometime in 2006 was the first time she knew for certain they were riding without permission. During cross-examination, Mrs. Combs testified as follows:

“Q. And did you ever feel like you were doing something that was considered to be trespass when you were riding in 1999, when you first started riding, that you were committing a trespass on someone else’s land?

“A. Well, there were so many people riding, we just had assumed that it was a permissible thing to do.

“Q. And that was what your husband said too. So you felt the same way?

“A. Yeah.”

C. Application of Law to Testimony

The testimony of the Combses demonstrates that they lacked the hostile intent required to obtain a prescriptive easement. Their state of mind when they used the riding trails was not hostile to the true owner, but based on the belief that the property was open to the public. In other words, they assumed use of the trails was permissible.

The only direct evidence in the record regarding the intent of the Combses is their own testimony regarding their state of mind when they used the riding trails. That testimony negates the existence of the requisite hostile intent. Consequently, we conclude that the evidence is insufficient to support a finding that the Combses used the riding trails with requisite hostile intent. As a result, their claim to a prescriptive easement must fail.

III. Section 1009

As an alternate ground for our decision, we address the applicability of section 1009 to the facts of this case. (See *Fire Ins. Exchange v. Abbott* (1988) 204 Cal.App.3d 1012, 1022 [when appellate court bases decision on alternate grounds, neither is dicta].)

A. Statutory Text and Case Law

Section 1009 provides that no recreational use of private property “shall ever ripen to confer upon the public ... a vested right to continue to make such use permanently” unless the property owner dedicates the land to public use and the government accepts the dedication. (§ 1009, subd. (b).) The Legislature made the following explicit findings in support of this provision:

“(1) It is in the best interests of the state to encourage owners of private real property to continue to make their lands available for public recreational use to supplement opportunities available on tax-supported publicly owned facilities.

“(2) Owners of private real property are confronted with the threat of loss of rights in their property if they allow or continue to allow members of the public to use, enjoy or pass over their property for recreational purposes.

“(3) The stability and marketability of record titles is clouded by such public use, thereby compelling the owner to exclude the public from his property.” (§ 1009, subd. (a).)

The meaning of the foregoing provisions was addressed in *Bustillos v. Murphy* (2002) 96 Cal.App.4th 1277 (*Bustillos*). In that case, the plaintiff sued a landowner, seeking a prescriptive easement to use a network of trails for recreational purposes. (*Id.* at p. 1279.) The trial court granted the landowner’s motion for summary judgment on the ground that section 1009 barred the plaintiff’s claim for an easement for recreational purposes. (*Bustillos*, at p. 1279.) The Court of Appeal agreed with the trial court’s application of section 1009 and affirmed the judgment. (*Bustillos*, at p. 1282.)

In *Bustillos*, the plaintiff and other people had used since 1973 a network of trails that criss-crossed an undeveloped piece of the defendant’s property next to a residential development. (*Bustillos*, *supra*, 96 Cal.App.4th at p. 1279.) The trails were used for walking, riding motorcycles and horses, and walking dogs, and were clearly visible from aerial photographs. (*Ibid.*) The plaintiff had repaired a number of the trails and had never seen anyone else making repairs. (*Ibid.*)

The plaintiff in *Bustillos* argued that section 1009 did not apply because he was seeking a private easement rather than an easement on behalf of the public in general. (*Bustillos*, *supra*, 96 Cal.App.4th at p. 1281.) The appellate court rejected this argument, stating the plaintiff’s claim was “exactly the type of claim addressed by the Legislature in section 1009, i.e., an attempt by a member of the public to obtain permanent recreational use of private property. The Legislature has made it clear that recreational use by a

member of the public cannot ripen into a permanent right to use the property for recreational purposes.” (*Bustillos*, at p. 1281.)

B. Contentions

The Regelsons argue that the granting of an easement for strictly recreational purposes is prohibited by section 1009 as interpreted by the court in *Bustillos*.

The Combses contend that their situation is distinguishable from *Bustillos*. They argue that their use of the trails was “wholly independent from any other riders” and done of their own accord.

C. Analysis

We reject the contention by the Combses that their use of the Regelson land was wholly independent from its use by other riders. In particular, the Combses testified that the trails were already established when they first used them. It follows that the horseback riding trails would not have existed but for the actions of other members of the public. In addition, the Combses did not place ribbons to mark the trails. That was done by others. Furthermore, the Combses rode on the trail because they thought the trails were open to the public. These are some of the facts that demonstrate the Combses’ use of the trail network was dependent upon (not independent of) the riding and trail marking other members of the public had done before the Combses began riding on the Regelson land. Thus, the Combses’ use presents a less compelling case for a private easement than that of the plaintiff in *Bustillos*. There, the plaintiff appears to have been (1) among the individuals whose use created the trail network and (2) the only person repairing the trail network. (*Bustillos*, *supra*, 96 Cal.App.4th at p. 1279.)

Based on the foregoing, this case does not justify a result different from the one reached in *Bustillos*. We conclude, therefore, that under section 1009 the Combses’ recreational use of a *preexisting* trail network cannot ripen into a permanent, personal right to continue to use the Regelson land for recreational purposes. If a private party could begin to use a network of trails established on private property by other members

of the public and then claim a private, prescriptive right to continue that use, the purpose of section 1009 would be eviscerated.

DISPOSITION

The judgment is reversed. Appellants shall recover their costs on appeal.

DAWSON, J.

WE CONCUR:

CORNELL, Acting P.J.

GOMES, J.